IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 76

THE COLD METAL PROCESS COMPANY and THE UNION NATIONAL BANK OF YOUNGSTOWN, OHIO, TRUSTEE, Petitioners,

v.

UNITED ENGINEERING & FOUNDRY COMPANY, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW.

The opinion of the District Court (R. 46-56) is reported at 132 F. Supp. 597.* The opinion of the Court of Appeals (R. 76) is reported at 221 F. 2d 115.

The earlier opinion of the Court of Appeals after final hearing and before the reference to a Master for an accounting (R. 178-188) is reported at 107 F. 2d 27. The opinion of the Court of Appeals regarding the nature of

* "R. . . . ." is used herein to designate the printed transcript of the record.

respondent's counterclaim (R. 200-210) is reported at 190 F. 2d 217.

Other opinions having a bearing on the historical background will be cited and discussed in the Statement.

JURISDICTION.

The order of the Court of Appeals was entered on April 21, 1955 (R. 77). A petition for a writ of *certiorari* was filed on May 13, 1955 and was granted on October 10, 1955 (R. 225). The jurisdiction of this Court rests on 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED.

The following questions are presented:

1. In an action involving a claim and a counterclaim arising out of the same transaction, does the entry of an order by the District Court, which grants a money judgment on one claim but leaves completely unadjudicated the counterclaim and which contains an express determination that there is no just reason for delay and directs the entry of judgment pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, automatically and conclusively create a final appealable order conferring jurisdiction in the Court of Appeals?

2. Does an order in an action involving a claim and a counterclaim arising out of the same transaction, which directs the entry of a money judgment on the claim but leaves completely unadjudicated a counterclaim seeking damages and a setoff, create a final decision from which an appeal lies to the Court of Appeals

merely because, pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, it recites that "there is no just reason for delay" and directs the entry of judgment?

3. If Rule 54 (b) is construed so as to confer appellate jurisdiction whenever a District Court applies the formula of the rule, where the Court of Appeals would not have had jurisdiction prior to the promulgation of amended Rule 54 (b), does the rule go beyond the rule-making powers of the United States Supreme Court in that it expands, revises and modifies the requirements for jurisdiction of the Courts of Appeals fixed in Section 1291 of Title 28 of the United States Code?

STATUTES AND RULES INVOLVED.

United States Code, Title 28, Judiciary and Judicial Procedure:

Section 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929.

Section 2071. Rule-making power generally.

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such

rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139 § 102, 63 Stat. 104.

Section 2072. Rules of civil procedure for district courts.

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at the beginning of a regular session and until after the close of such session.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446.

Statutes and Rules Involved.

Federal Rules of Civil Procedure:

Rule 54. Judgments; Costs (as originally promulgated, effective September 16, 1938).

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Rule 54. Judgments; Costs (as amended December 27, 1946, effective March 19, 1948).

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

Rule 82. Jurisdiction and Venue Unaffected.

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. As amended Dec. 29, 1948, eff. Oct. 20, 1949.

STATEMENT.

The Cold Metal Process Company (hereinafter referred to as "Cold Metal"), on November 17, 1934, filed its complaint (R. 77-96) seeking specific enforcement of an agreement, dated June 20, 1927, against respondent (Equity No. 2991). Under that agreement (R. 16-18), respondent was entitled to receive certain license rights under what later became U. S. Letters Patent No. 1,779,195, and Cold Metal was to receive royalty payments for those rights. In its original answer (R. 97-127), respondent sought dismissal of the complaint. After a hearing on a motion for preliminary injunction and an appeal from the denial thereof, Cold Metal filed a supplemental complaint (R. 127-134) seeking, alternatively, specific enforcement or rescission of the agreement. Respondent answered the supplemental complaint (R. 135-152), asserting numerous defenses. After final hearing, the District Court (R. 152-177) denied rescission and granted specific performance, holding Cold Metal entitled to recover against respondent and ordering an accounting to determine the amount to be paid by respondent. The District Court's decree was affirmed on appeal (R. 178-188) in an opinion reported at 107 F. 2d 27.

On June 20, 1941, respondent moved for leave to file a second supplemental answer and counterclaim, seeking substantially the same relief it now seeks in its pending counterclaim (R. 23-27). That motion was denied (R. 188-192) in an opinion reported at 43 F. Supp. 375.

Thereafter, an accounting was had before a Master.

While the action was pending before the Master, respondent filed an ancillary cross-complaint (Civil Action No. 7744), which was initially dismissed by the District Court (R. 193-200), but which was reinstated by the Court of Appeals (R. 200-210), in an opinion reported at 190 F. 2d 217, as a *counterclaim in this action.* Respondent amended its pleading, filing its amended counterclaim on October 29, 1951 (R. 28-44), pursuant to leave granted by the District Court (R. 44-45). Petitioners replied to that counterclaim (R. 210-224). That counterclaim, as the Court of Appeals held (R. 207), "grew out of the same 'transaction' or 'occurrence' " as Cold Metal's claim and would have been a compulsory one had it matured when respondent's original answer was filed (R. 206-207).

In its pending unadjudicated counterclaim, respondent pleaded *in extenso* evidential matter similar to the matters on which it relied before the Master in support of its defense of failure of consideration. However, in its counterclaim, these same facts are relied upon as a basis for a setoff against the amount awarded to petitioners by the Master and the District Court on the claim asserted in the complaint. Respondent has repeatedly asserted in the Court of Appeals and in its brief opposing the petition for *certiorari* that the issues raised in the counterclaim are "dependent issues" and that the counterclaim is a "defensive counterclaim for setoff or recoupment." All of respondent's claims asserted in the counterclaim arise out of the same transaction as petitioners' claim. In this regard, the Court of Appeals held (R. 206-207; 190 F. 2d 217, 221):

> "So clearly is the subject matter of United's counterclaim ancillary to the proceeding at No. 2991

that had the counterclaim matured when the original answer was filed, the counterclaim would have been 'compulsory' within the purview of Rule 13(a) and had United failed to plead it, it could not subsequently have been maintained. United's counterclaim grew out of the same 'transaction' or 'occurrence' which created Cold Metal's claim, viz., the 1927 agreement."

On May 28, 1954, the report of the Master on petitioners' claim was filed, in which he awarded petitioners the sum of $387,650.00.

In the summer of 1954, while the parties were working on objections to the Master's report, respondent's counterclaim was about to come on for trial before Judge Miller. Both parties requested that trial of the counterclaim be held up until the District Court (Judge Willson) disposed of the objections to the Master's report. On July 6, 1954, the District Court entered an order (R. 45-46) removing the counterclaim from the trial calendar, subject to reinstatement for trial at any time by order of the Court upon its own initiative or upon request of either party.

Objections to the Master's report were filed in July, 1954, and, on January 19, 1955, the District Court filed its opinion (R. 46-56) and entered an order (R. 56-57) confirming the Master's report and directing the entry of judgment for petitioners.

On February 7, 1955, respondent appealed and petitioners moved to dismiss that appeal on the ground that it was not a final appealable decision in view of the counterclaim seeking a setoff and in view of the fact

that it did not contain the express requirements of Rule 54(b). On March 21, 1955 (R. 57-58), the Court of Appeals held the judgment was not a final decision and dismissed respondent's appeal without prejudice to the right of respondent to apply to the District Court for a new order.

Thereafter, the order of January 19, 1955 was vacated and an amended order entered on March 30, 1955 (R. 73-74). The amended order is substantially identical with the original order of January 19, 1955 except that it includes an express determination under Rule 54(b) that "there is no just reason for delay" and directs the entry of judgment. The proceedings in the District Court (R. 60-72) show that the District Court did not give any real consideration to the counterclaim and inserted what it termed the "magic sentence" of Rule 54 (b) in the order, despite the fact that the pendency of the counterclaim seeking a setoff was called to its attention. The sole reason given by the District Court for including the required determinations in its order was that it wanted enlightenment from the Court of Appeals to assist it in determining the issues raised in the counterclaim (R. 69, 70, 71). And, even though the District Court did use the talismanic language of the rule, it did not intend to relinquish control over or the right to modify that judgment, for it expressly said (R. 68) that, if the Court of Appeals should affirm, "then the counterclaim can be asserted against that judgment."

Respondent, on March 31, 1955, appealed from the order and judgment of March 30, 1955. Petitioners then moved to dismiss that appeal on the ground that the amended order and judgment from which the appeal

had been taken do not constitute a final decision under Title 28, United States Code, Section 1291, since there has been no adjudication of respondent's counterclaim seeking an accounting, damages, and a setoff on the basis of facts arising out of the same transaction as that on which the complaint was based (R. 74-75). On April 21, 1955 (R. 76-77), the Court of Appeals entered an order denying the motion and filed an opinion holding that the determination made pursuant to Rule 54(b) "is the very kind of thing Rule 54(b) was written to provide for," thus holding, in accord with its earlier decision in *Bendix Aviation Corp. v. Glass,* (3 Cir., 1952) 195 F. 2d 267, that the District Court's certification as to finality under Rule 54 (b) conclusively conferred jurisdiction upon the Court of Appeals, irrespective of the presence of the unadjudicated counterclaim arising out of the same transaction.

SUMMARY OF ARGUMENT

Under Article I, Section 8, of the Constitution, Congress was given the power "to constitute" tribunals inferior to the Supreme Court. Under this grant, only Congress can confer jurisdiction upon the inferior Federal Courts and only Congress can regulate the scope and terms of that jurisdiction.

Both this Court and the inferior Federal Courts have the inherent power to adopt rules. But that power is of a limited nature and does not extend to enlargement or restriction of jurisdiction.

The rule-making power of this Court in regard to the Federal Rules of Civil Procedure stems from the Enabling Act of June 19, 1934 (c. 651, 48 Stat. 1064; 28 U.S.C., Section 2072). That power was limited to promulgating rules covering "the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." The Act expressly provided that the rules "shall neither abridge, enlarge nor modify the substantative rights of any litigant." Congress, in the Enabling Act, did not grant this Court any power to extend or restrict jurisdiction; and this Court has repeatedly held that it does not have the right or power, by rules, to enlarge, restrict or modify the jurisdiction of the inferior Federal Courts and, more specifically, appellate jurisdiction: *Sibbach v. Wilson & Co. Inc.*, (1941) 312 U.S. 1, 10; *United States v. Sherwood*, (1941) 312 U.S. 584, 589; *Baltimore Contractors, Inc. v. Bodinger*, (1955) 348 U.S. 176, 181.

The requirements for appellate jurisdiction in the Courts of Appeals have been established by Congress

(Title 28, United States Code, Sections 1291 and 1292). The jurisdiction of the Court of Appeals in this case must rest upon Section 1291, which limits jurisdiction to "final decisions." This requirement for appellate jurisdiction has been a part of our law since the first Judiciary Act of 1789 and was reenacted into the Code in 1948.

The decisions interpreting and applying the Congressional mandate limiting appellate jurisdiction to final decisions thoroughly establish that, in a case involving a claim and a counterclaim arising out of the same transaction or occurrence, no final decision can be rendered until both are adjudicated and that a decision on either the claim or the counterclaim alone is not a final decision and, hence, not appealable.

The context and history of the Rules of Civil Procedure and the declared and recognized limitations on the rule-making power of this Court demonstrate that Rule 54 (b) does not and was not intended to regulate or determine appellate jurisdiction or to grant to the District Courts the power conclusively to fix appellate jurisdiction or to modify the statutory requirements for appellate jurisdiction. This Court has expressly held, in *Baltimore Contractors, Inc. v. Bodinger,* (1955) 348 U.S. 176, 181, 182, that it "is not authorized to approve or declare judicial modification" of appellate jurisdiction and that only Congress has the power to enlarge the list of appealable interlocutory orders or to allow fragmentary appeals "in the discretion of the trial judge upon findings of need." Thus, this Court, in effect, already has declared against the broad or "affirmative" construction of amended Rule 54(b). Long prior to the Rules, this Court has repeatedly held that Congress alone has the power to determine "whether the judgment of a court of

the United States, of competent jurisdiction, shall be reviewed or not": *Ex Parte Pennsylvania,* (1883) 109 U.S. 174; *Hudson v. Parker,* (1895) 156 U.S. 277.

Amended Rule 54 (b), if given the "affirmative" or broad construction, enlarges the appellate jurisdiction of the Courts of Appeals and this Court and reallocates judicial power between District Courts and the Courts of Appeals. It enables the trial Court, in its discretion from case to case, to determine appealability. It involves authority to ignore this Court's prior construction of the statutes relating to appeals.

When construed properly, amended Rule 54 (b) merely provides that a decision cannot be a final decision if the District Court refuses to relinquish its control over the decision or its right to modify it. As this Court stated, in *Dickinson v. Petroleum Conversion Corp.,* (1950) 338 U.S. 507, 512, it provides "an opportunity for litigants to obtain from the District Court a clear statement of what that court is intending with reference to finality." If the District Court does not employ the talismanic language of the amended rule, then this means that the District Court wishes to withhold its ultimate decision but, if it employs the language of the rule in its order, it merely means that *that* Court intends to relinquish control. Even if the order contains the determinations specified in the rule, appealability still depends upon whether the decision is final under Section 1291; and the Court of Appeals must proceed to examine the decision to determine whether or not it has statutory finality.

If given any other construction, and, more specifically, if construed to enlarge appellate jurisdiction or to

render final the District Court's order in this case containing the determinations of the rule, the rule exceeds the rule-making power of this Court and is invalid. It violates Section 1291 and also the Enabling Act authorizing the rules. It extends the jurisdiction of the District Courts by vesting in them power conclusively to grant and determine appellate jurisdiction—a power possessed only by Congress. It extends or enlarges appellate jurisdiction by granting appellate jurisdiction to the Courts of Appeals in cases in which no final decision has been rendered. It abridges and modifies the substantive rights of litigants contrary to the express command of the Enabling Act.

If construed to fix and enlarge appellate jurisdiction, amended Rule 54 (b) would create numerous difficulties in judicial administration. While it provides a purely mechanical method of determining appealability, there would be a complete lack of uniformity in regard to appellate jurisdiction. It would give District Courts discretionary power to divest litigants of substantive rights. This interpretation provides no method for dealing with any abuse of discretion or any errors on the part of the District Court in regard to appealability. It would create more problems in judicial administration than it would solve; whereas, a proper construction of amended Rule 54 (b) will serve to surmount the primary difficulties arising out of original Rule 54 (b).

When properly construed in the so-called "negative" fashion, amended Rule 54 (b) does not vest appellate jurisdiction in the Court of Appeals in the case at bar and, hence, respondent's appeal should have been dismissed.

ARGUMENT.

A. Introductory Statement.

The Court of Appeals held final and appealable a judgment disposing of a claim asserted in the complaint but leaving completely undetermined respondent's counterclaim arising out of the same transaction, merely because that judgment contains the talismanic language set forth in amended Rule 54 (b). Respondent's counterclaim not only arose out of the same transaction, as the Court of Appeals held (R. 206-207), but it avowedly seeks modification or extinguishment of the very judgment from which respondent has appealed.

The judgment in question would not have been appealable either prior to the enactment of the Federal Rules of Civil Procedure or under original Rule 54 (b).* Thus, the issue is squarely raised as to whether the inclusion in the order of the determinations specified in amended Rule 54 (b) can fix and enlarge appellate jurisdiction so as to give the Court of Appeals jurisdiction which it would not have had prior to the enactment of amended Rule 54 (b)

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* *Bowker v. United States,* (1902) 186 U.S. 135; *Winters v. Ethell,* (1889) 132 U.S. 207, 210; *General Electric Co. et al. v. Marvel Rare Metals Co. et al.,* (1932) 287 U.S. 430, 432; *Nachtman v. Crucible Steel Co. of America,* (3 Cir., 1948) 165 F. 2d 997; *Audi Vision Inc. et al. v. RCA Mfg. Co., Inc.,* (2 Cir., 1943) 136 F. 2d 621; *Eastern Transportation Co. v. United States,* (2 Cir., 1947) 159 F. 2d 349; *Petrol Corporation v. Petroleum Heat & Power Co., Inc. et al.,* (2 Cir., 1947) 162 F. 2d 327; *Toomey et al. v. Toomey et al.,* (C.A. D.C., 1945) 149 F. 2d 19; *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corporation et al.,* (2 Cir., 1946) 154 F. 2d 814; Cert. Den. 328 U.S. 859.

The scope, meaning and effect of amended Rule 54 (b) have been discussed at length by the Courts of Appeals in the following cases, among others:

Flegenheimer v. General Mills, Inc., (2 Cir., 1951) 191 F. 2d 237;

Pabellon v. Grace Line, Inc., (2 Cir., 1951) 191 F. 2d 169;

Lopinsky v. Hertz Drive-Ur-Self Systems, Inc. et al., (2 Cir., 1951) 194 F. 2d 422;

Rieser, et al. v. The Baltimore and Ohio Railroad Company, (2 Cir., 1955) 224 F. 2d 198;

Leonidakis v. International Telecoin Corp., (2 Cir., 1953) 208 F. 2d 934;

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Bruce A. Mackey et al. v. Sears, Roebuck & Co., (7 Cir., 1955) 218 F. 2d 295;

Gold Seal Co. v. Weeks, (C.A. D.C., 1954) 209 F. 2d 802.

Petitioners rely strongly upon the careful reasoning of Judge Learned Hand, in *Flegenheimer v. General Mills, Inc.*, (2 Cir., 1951) 191 F. 2d 237, Judge Frank, in

concurring opinions in *Pabellon v. Grace Line, Inc.*, (2 Cir., 1951) 191 F. 2d 169, 176-181, and *Rieser, et al. v. The Baltimore and Ohio Railroad Company,* (2 Cir., 1955) 224 F. 2d 198, and Judge Hastie, in a concurring opinion in *Bendix Aviation Corp. v. Glass,* (3 Cir., 1952) 195 F. 2d 267, 277-282. Those opinions express the so-called "negative" view of amended Rule 54 (b) and reject the so-called "affirmative" view expressed in other opinions and which Judge Learned Hand has described as bringing about a revolutionary inversion in determining appellate jurisdiction. The views so clearly expressed by Judge Hastie in the *Bendix* case, *supra,* leave unimpaired the usefulness of amended Rule 54 (b) and prevent the rule from operating to fix and enlarge appellate jurisdiction, thus preserving the intended benefits of the rule without rendering it invalid and without requiring the Courts of Appeals and this Court to surrender the power to determine their own appellate jurisdiction.

B. The Requirements for Appellate Jurisdiction Have Been Established by Congressional Enactments.

The appellate jurisdiction of the Courts of Appeals is fixed by Congressional enactments. Section 1291 of Title 28 of the United States Code grants to the Courts of Appeals "jurisdiction of appeals from all final decisions of the district courts of the United States." This requirement of finality in the present Code is a reiteration of a consistent requirement which has been a part of the law since the first Judiciary Act of 1789 (1 Stat. 73). Section 1292 of the Code covers certain exceptions to this requirement, but those exceptions are not applicable here. The primary reasons for this Congressional requirement

are aptly stated by Mr. Justice Frankfurter in *Cobbledick et al. v. United States,* (1940) 309 U.S. 323, as follows (pp. 324-326):

> "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause." * * *
>
> "In thus denying to the appellate courts the power to review rulings at *nisi prius,* generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality—the idea underlying 'final judgments and decrees' in the Judiciary Act of 1789 and now expressed by 'final decisions' in § 128 of the Judicial Code—is not a technical concept of temporal or

physical termination. It is the means for achieving a healthy legal system."

And, in the later case of *Catlin et al., Trustees, v. United States,* (1945) 324 U.S. 229, this Court stated (pp. 233-234):

"Their right to appeal rests upon § 128 of the Judicial Code. This limits review to 'final decisions' in the District Court. A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *St. Louis, I.M. & S.R.Co. v. Southern Express Co.*, 108 U.S. 24, 28. * * * The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. 'The case is not to be sent up in fragments * * *' *Luxton v. North River Bridge Co.*, 147 U.S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals."

See also: *McLish v. Roff,* (1891) 141 U.S. 661, 665;

Cohen, et al. v. Beneficial Industrial Loan Corp. et al., (1949) 337 U.S. 541, 546;

Stefanelli et al. v. Minard et al., (1951) 342 U.S. 117, 123;

Roche, U.S. District Judge, et al. v. Evaporated Milk Association et al., (1943) 319 U.S. 21, 29-30;

Baltimore Contractors, Inc. v. Bodinger, (1955) 348 U.S. 176, 181.

C. This Court's Decisions Interpreting and Applying the Congressional Mandate Preclude Appellate Jurisdiction in the Present Posture of the Case at Bar.

The requirement of finality has been considered by this Court in many decisions. As stated in *Catlin et al., Trustees, v. United States,* (1945) 324 U.S. 229, a "final decision" generally is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." This, of course, does not mean that the entire case must be covered by one final judgment, for this Court has repeatedly recognized that a decision which concludes the litigation as to a complete judicial unit is a final decision, and this is true irrespective of whether that judicial unit is the entire case or one phase of the case so separate and distinct from any other phase of the case that it constitutes, in effect, a case within a case: *Reeves v. Beardall, Executor,* (1942) 316 U.S. 283, 285.

In addition to disposing finally of a complete judicial unit, the subject-matter of the appeal must be put beyond the power and control of the trial Court:

Cohen, Executrix, et al. v. Beneficial Industrial Loan Corp. et al., (1949) 337 U.S. 541, 546;

Covington v. Covington First National Bank, (1902) 185 U.S. 270, 277;

City of Paducah, Kentucky v. East Tennessee Telephone Company, (1913) 229 U.S. 476, 480.

When these two conditions are met, then a decision is final under the decisions of this Court and the appellate Court has jurisdiction.

Long prior to the enactment of the Federal Rules, this Court recognized that a decision which adjudicated only one of two or more claims arising out of the same transaction or occurrence did not adjudicate a complete judicial unit and, hence, was not a final decision from which an appeal would lie. In *Bowker v. United States,* (1902) 186 U.S. 135, a libel was filed on behalf of the United States seeking damages resulting from a collision. A cross-libel was filed seeking damages against the United States alleged to have been sustained in the same collision. The cross-libel was dismissed. Whereupon, the cross-libellant appealed and the appeal was allowed on the question of jurisdiction. This Court, in holding the dismissal of the cross-libel not a final judgment, stated (p. 138):

> "It was settled, soon after the passage of the act of 1891, that cases in which the jurisdiction of the District or Circuit Courts was in issue could be brought to this court only after final judgment. *McLish v. Roff,* 141 U.S. 661, *Railway Company v. Roberts,* 141 U.S. 690. The subject was carefully considered in the opinion of Mr. Justice Lamar in the first of these cases, and the conclusion reached was in accordance with the general rule that a case cannot be brought to this court in parcels. *Railway Company v. Postal Telegraph Company,* 179 U.S. 641.
>
> "The preliminary question is, therefore, whether the decree dismissing this cross-libel is a final judgment within the rule upon that subject. It was long ago held that a decree dismissing a cross-bill in equity could not be considered, standing alone, as a final decree in the suit, and was not the subject of an independent appeal to this court under the

judiciary act of 1789; and that it could only be reviewed on an appeal from a final decree disposing of the whole case. *Ayres v. Carver,* 17 How. 591; *Ex parte Railroad Company,* 95 U.S. 221."

In the earlier case of *Winters v. Ethell,* (1889) 132 U.S. 207, the complaint alleged a cause of action based upon a license covering the working of certain mining property. Defendants filed a cross-complaint praying for certain relief in respect of the same agreement and the working of the mining claim. The cross-complaint was dismissed and plaintiffs were awarded certain relief, including an accounting. Defendants appealed. This Court held the decree was not a final one and was not appealable, stating (p. 210):

> "Nor does it make any difference that the decree in the present case dismisses the cross-complaint of the defendants. The filing of the cross-complaint was not the institution of a separate suit, but grew out of the original complaint. There was but a single decree, and that was entitled in the original suit. The right of the defendants to appeal from the decree, so far as their cross-complaint is concerned, will be preserved; and time will run against them, as to all parts of the present judgment of the District Court, only from the time of the entry of a final decree after a hearing under the accounting which is to be had. *Ayers v. Chicago,* 101 U.S. 184, 187."

Original Rule 54(b) did not alter the requirements for appellate jurisdiction. It was designed to take care of the liberality provided in the other rules in respect of the pleading in one action of a variety of claims, counterclaims and cross-claims. The purpose underlying that rule was to adapt the established single

judicial unit theory of finality to a civil action containing two or more separate and distinct claims: *Moore's Federal Practice,* Second Edition, Vol. 6, p. 169. In construing original Rule 54(b), this Court, in *Reeves v. Beardall, Executor,* (1942) 316 U.S. 283, 285, recognized that the rules made it clear that "it is 'differing occurrences or transactions, which form the basis of separate units of judicial action' " and that, in multiple claims cases, it was necessary, in order to have a final judgment on one or more of the claims, that they arise out of differing occurrences or transactions.

The Courts of Appeals, on numerous occasions, applied the separate judicial unit rule, holding that no final and appealable decision could be rendered in the absence of a determination of the issues material to a particular claim and all counterclaims arising out of the same transaction or occurrence. Examples of such cases are:

Nachtman v. Crucible Steel Co. of America, (3 Cir., 1948) 165 F. 2d 997;

Audi Vision Inc. et al. v. RCA Mfg. Co., Inc., (2 Cir., 1943) 136 F. 2d 621;

Eastern Transportation Co. v. United States, (2 Cir., 1947) 159 F. 2d 349;

Petrol Corporation v. Petroleum Heat & Power Co., Inc. et al., (2 Cir., 1947) 162 F. 2d 327;

Toomey et al. v. Toomey et al., (C.A. D.C., 1945) 149 F. 2d 19;

Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corporation et al., (2 Cir., 1946) 154 F. 2d 814.

Thus, both prior to the enactment of the rules and under original Rule 54(b), this Court and others applied the judicial unit rule, holding that the requirements for appellate jurisdiction were not present until a decision or judgment had been rendered disposing of all related claims, *i.e.*, all claims arising out of the same transaction or occurrence.

Under no view of finality enunciated prior to the enactment of amended Rule 54(b) could the decision in question be considered as a final decision.

D. The Context and History of Rule 54 (b) Show That the Rule Does Not and Was Not Intended to Give the District Courts Power Conclusively to Fix Appellate Jurisdiction.

There is nothing in the language employed in Rule 54 (b) purporting to grant to the District Courts discretionary power to fix conclusively the appellate jurisdiction of either this Court or the Courts of Appeals. Nor is there any language in the rule even indicating an intent to depart from the long-standing right and duty of each appellate Court to inquire, even on its own motion, into the question of jurisdiction. The rule simply specifies that, when more than one "claim for relief" is presented, the Court "may direct" the entry of a final judgment on less than all of the claims "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The rule then proceeds to state that, in the absence of such determination and direction, any order adjudicating less than all of the claims shall not terminate the action as to any of the claims and shall be

subject to revision at any time before the entry of judgment adjudicating all of the claims.

As Judge Learned Hand pointed out, in *Flegenheimer v. General Mills, Inc.*, (2 Cir., 1951) 191 F. 2d 237, 241, this "is language of restriction, not of grant." The rule does not say that a final appealable judgment can be entered if the two requirements are met, but merely states that the Court "may direct" the entry of a final judgment "only" upon compliance with those requirements of the rule which clearly evidence an intent on the part of the Court to relinquish the adjudicated claim. As Judge Learned Hand pointed out in the *Flegenheimer* case, *supra*, nowhere in the rule "can be found a suggestion that the judge can make that 'final' which was not 'final' before." In other words, the rule merely provides that the judge shall evidence his intentions by writing into the judgment the requirements of the rule.

Although this Court did not have occasion to apply amended Rule 54 (b) in *Dickinson v. Petroleum Conversion Corp.*, (1950) 338 U.S. 507, 512, this Court did refer to the amended rule, pointing out that the purpose thereof was to reduce the uncertainty and hazards assumed by a litigant who either does or does not appeal from a judgment and to provide "an opportunity for litigants to obtain from the District Court a clear statement of what that court is intending with reference to finality." Thus, this Court, in pointing out the purpose of the amended rule, did not indicate that a judgment containing the imprimatur of the rule would be final, but only that the certification would serve to indicate the intent of the District Court.

The views just stated are emphasized and supported by the last sentence of the rule which gives a completely negative significance to the words "final judgment" appearing in the first sentence of the amended rule. The amended rule seeks simply to make certain the time when the District Court relinquishes its partial decision. Until the Court does release its decision without reservation, a party may safely refrain from filing an appeal. And, when construed in this way, the rule accomplishes one of its major purposes, namely, to provide a measure of certainty concerning appealability.

The historical background of the rule likewise demonstrates that there was no intent on the part of this Court or the draftsmen of the rules (a) to place in the hands of the District Courts power conclusively to fix appellate jurisdiction, or (b) to strip this Court and the Courts of Appeals of their power to determine whether the jurisdictional requirements are present, or (c) to abandon the "ancient policy" and "historical rule" against piecemeal disposition of cases, or (d) to abandon the judicial unit theory as applied to multiple claims arising out of the same transaction or occurrence.

In one of the early drafts of the original rules, namely, that of May, 1936, proposed Rule 63 provided that a judgment or final order could be entered upon "any issue or issues" determined in favor of one party and the action could proceed as to the remaining issues or parties, and that such a judgment or order would be final "for all purposes including the right to appeal therefrom": *Preliminary Draft of Rules of Civil Procedure* (May, 1936), page 109. That draft rule pro-

voked serious misgivings as to validity since it "materially enlarged" appellate jurisdiction: *6 Moore's Federal Practice* (Second Edition, 1953), Par. 54.21, p. 166; *Pabellon v. Grace Line, Inc.*, (2 Cir., 1951) 191 F.2d 169, 177. The proposed rule was abandoned and replaced by original Rule 54 (b): *Report of Advisory Committee on Rules of Civil Procedure* (April, 1937), page 135. Original Rule 54 (b) adopted a separate and distinct claim and all counterclaims arising out of the same transaction or occurrence as a judicial unit and properly provided that, if the Court adjudicated such a unit, a final judgment could be entered, although other claims remained pending. This single judicial unit theory was approved by this Court in *Reeves v. Beardall, Executor*, (1942) 316 U.S. 283.

Some confusion arose under original Rule 54 (b) and, in order to eliminate this confusion, Rule 54 (b) was amended. In May, 1944, the Advisory Committee proposed a revision of Rule 54 (b) which retained the same judicial unit theory existing under original Rule 54 (b), namely, all claims arising out of the same transaction or occurrence. The Committee's notes accompanying this proposed amendment expressly pointed out that the amended rule was designed "to make clear that interim adjudications disposing of some, but not all, of the claims, counterclaims, cross-claims and third-party claims arising out of a single transaction or occurrence are provisional." In May, 1945, the Committee made public its second draft of the proposed amendment to Rule 54 (b). This draft included a provision that a final judgment could be entered on less than all claims arising out of a single transaction if the Court ordered that there was no just reason for

delay. This proposal, however, was abandoned and amended Rule 54 (b), in its present form, adopted. And, in adopting amended Rule 54 (b) in its present form, the Advisory Committee stated (Title 28, U.S.C., following Rule 54):

> "The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. * * * Rule 54 (b) was originally adopted in view of the wide scope and possible content of the newly created 'civil action' in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above, which, indeed, has more recently been reiterated in Catlin v. United States, 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L. Ed. 911. * * *
>
> "Unfortunately, this was not always understood, and some confusion ensued. * * *
>
> "In view of the difficulty thus disclosed, the Advisory Committee in its two preliminary drafts of proposed amendments attempted to redefine the original rule with particular stress upon the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence. This attempt appeared to meet with almost universal approval from those of the profession commenting upon it, although there were, of course, helpful suggestions for additional changes in language or clarification of detail. But cf. Circuit Judge Frank's dissenting opinion in

Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp., supra, n. 21 of the dissenting opinion. The Committee, however, became convinced on careful study of its own proposals that the seeds of ambiguity still remained, and that it had not completely solved the problem of piecemeal appeals. After extended consideration, it concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended rule 54 (b). It reestablishes an ancient policy with clarity and precision."

Thus, despite some later statements to the contrary, it is clear that the draftsmen of the rules did not intend any such radical departure from established law as that adopted by the Court below in the case at bar and in its earlier decision of *Bendix Aviation Corp. v. Glass,* (1952) 195 F. 2d 267. On the contrary, the avowed objective was to follow the "historical rule" against piecemeal disposal of litigation and to reestablish the "ancient policy with clarity and precision." The avowed policy was to follow the rule which permits appeals only from final judgments, except in those special instances covered by statute. And there is nothing in this Court's comment on amended Rule 54 (b) in *Dickinson v. Petroleum Conversion Corp.,* (1950) 338 U.S. 507, which would indicate that this Court felt there had been wrought "so revolutionary an inversion" as that involved in the affirmative view. On the contrary, this Court, in the *Dickinson* case, *supra,* indicated that, in its view, the amended rule merely provided for a clear statement "of what that

court." *i.e.*, the District Court, "is intending with reference to finality."

Thus, both the language of the rule and the historical background thereof indicate clearly the soundness of the so-called "negative" view, as expressed by Judge Hastie in the *Bendix* case, *supra*, and by Judge Learned Hand in the *Flegenheimer* case, *supra*.

We shall not attempt to discuss herein the reasoning of the Courts enunciating the broad or affirmative view. We shall limit our comments in this regard to the *Bendix* case. That decision proceeds on the assumption that finality is solely dependent upon whether the District Court has retained the power and ability to alter its decision. But this is not correct. Finality does not depend upon any mere mechanical action of the District Court or on the power or ability to alter its decision. On the contrary, it depends upon the quantum of litigation covered by the determinations made by the District Court. Nor does finality depend upon procedural rules. Finality is clearly a substantive matter. So far as we are aware, there is no case decided by this Court which bases finality on such nebulous and shifting grounds as those employed by the Court of Appeals in the *Bendix* case. On the contrary, this Court has clearly indicated that finality does not depend solely upon the question whether the judgment is subject to further revision by the District Court: *Cobbledick et al. v. United States*, (1940) 309 U.S. 323; *Collins v. Miller*, (1920) 252 U.S. 364; *Berman v. United States*, (1937) 302 U.S. 211.

Furthermore, the reasoning and conclusions of the Court in the *Bendix* case necessarily invest the District Courts with authority to change the meaning of U.S.C.,

Section 1291 at will and, in the process, to ignore this Court's prior construction of that statute. This is completely contrary to any proper exercise of judicial power. This Court, in *Baltimore Contractors, Inc. v. Bodinger,* (1955) 348 U.S. 176, 181, expressly stated that this Court "is not authorized to approve or declare judicial modification" of appellate jurisdiction, so, *a fortiori,* the District Courts cannot do so.

The argument of convenience advanced by some of the proponents of the affirmative view is of no consequence. That argument seems to be that, by permitting the District Court to enter a final judgment on one phase of the case, an extended trial and the cost and inconvenience thereof may be avoided in many cases. This Court, however, in *Roche, U.S. District Judge, et al. v. Evaporated Milk Association et al.,* (1943) 319 U.S. 21, 30, expressly pointed out that "that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable." And, in the *Baltimore Contractors* case, *supra,* this Court pointed out (p. 185) that Congress has not seen fit to "authorize appeals to simplify litigation."

E. Rule 54 (b) Does Not and Was Not Intended to Enlarge Appellate Jurisdiction.

The so-called "affirmative" view of amended Rule 54 (b), as enounced by the Court below, in *Bendix Aviation Corp. v. Glass,* (1952) 195 F. 2d 267, and as applied in this action, enlarges appellate jurisdiction since it renders appealable a decision on a claim and which leaves unadjudicated a counterclaim arising out of the same transaction or occurrence. Such a decision is historically not a final decision under any of the adjudications antedating the amendment to Rule 54 (b).

It is proper to assume that this Court, in promulgating amended Rule 54 (b), did not intend to enlarge appellate jurisdiction or to place in the hands of the District Courts power conclusively to fix the appellate jurisdiction of this Court or of the Courts of Appeals. The absence of any intent to enlarge appellate jurisdiction seems plain from the Enabling Act and this Court's decisions.

The Rules of Civil Procedure were promulgated under the authority of the Act of June 19, 1934 (c. 651, 48 Stat. 1064 old 28 U.S.C., § 723 b, c.). That Act granted this Court power to prescribe, by general rules, "the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." It expressly provided that the rules "shall neither abridge, enlarge nor modify the substantive rights of any litigant." In commenting upon that Act and the limitations thereof, this Court, in *Sibbach v. Wilson & Co., Inc.,* (1941) 312 U.S. 1, stated (p. 10):

> "Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and pro-

cedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not 'abridge, enlarge, nor modify substantive rights,' in the guise of regulating procedure. The second is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved. There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, *the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute.*"*.

Thus, this Court expressly recognized that the rules promulgated could not, "in the guise of regulating procedure," enlarge or modify substantive rights or "extend or restrict the jurisdiction conferred by a statute." See also:

Hudson v. Parker, (1895) 156 U.S. 277, 284;

Venner v. Great Northern Railway Company, (1908) 209 U.S. 24, 35;

Davidson Bros. Marble Company v. United States on the Relation of Gibson, (1909) 213 U.S. 10, 18;

Meek v. Centre County Banking Co. et al. (1925) 268 U.S. 426, 434.

Again, in *United States v. Sherwood,* (1941) 312 U.S. 584, this Court stated (pp. 589-590):

"An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is

*Emphasis ours throughout this brief except where noted otherwise.

not an authority to enlarge that jurisdiction; and the Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C. 723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants *or to enlarge or diminish the jurisdiction of federal courts.*"

In *United States v. Florian, Executor,* (1941) 312 U.S. 656, this Court reversed the judgment of the Court below for want of jurisdiction because of the absence of a final judgment in the District Court. Thus, this Court, in effect, reinstated the Court of Appeals' earlier opinion in which it had held the judgment not final and that the Rules had not changed the requirements for a final decision.

Again, in *Baltimore Contractors, Inc. v. Bodinger,* (1955) 348 U.S. 176, this Court recognized that it was not authorized to approve or declare judicial modification of the requirements of appellate jurisdiction, stating (pp. 181-182):

"The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction. *This Court, however, is not authorized to approve or declare judicial modification.* It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the fed-

> eral system. *Shanferoke Corp. v. Westchester Corp.*, 293 U.S. 449, 451. Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. *The choices fall in the legislative domain.* They are enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or a general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent or approval of the appellate court."

And, in its opinion, this Court (p. 178) recognized and reiterated that the "requirement of finality has remained a part of our law" since the Judiciary Act of 1789.

The doctrine that the Court cannot, by rule, enlarge or restrict its own jurisdiction or that of other Courts of the United States and that Congress alone has this power was recognized in the law long prior to the enactment of the present rules. In *Hudson v. Parker,* (1895) 156 U.S. 277, this Court stated (p. 284):

> "This court cannot, indeed, by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other courts of the United States, or of a justice or judge of either, under the Constitution and laws of the United States. *Poultney v. La Fayette,* 12 Pet. 472; *The St. Lawrence,* 1 Black, 522, 526; *The Lottawanna,* 21 Wall. 558, 576, 579. Nor has it assumed to do so."

In *Ex Parte Pennsylvania,* (1883) 109 U.S. 174, the Court recognized that Congress alone had the power to determine appellate jurisdiction, stating (p. 176):

"Congress alone has the power to determine whether the judgment of a court of the United States, of competent jurisdiction, shall be reviewed or not."

The doctrines of the above cases stem from the fundamental character of the judicial system originating in the Constitution. The judicial power is dependent for its distribution and organization and for the modes of its exercise entirely upon the action of Congress which has the sole power of creating tribunals inferior to this Court and of investing them with jurisdiction. And, as stated by Mr. Justice Daniel, in *Cary et al. v. Curtis,* (1844) 3 How. 236, 245:

"It follows then, that the courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them."

Certainly, it was not the intention of the draftsmen of the rules or of this Court in promulgating them, to depart from these established principles or to circumvent, by indirection, the clear requirement of Section 1291 by an enlargement of appellate jurisdiction. The contention of the proponents of the so-called "affirmative" view necessarily presupposes an intention to enlarge appellate jurisdiction by the rule, and this contention is all the more astounding since it places in the hands of the District Court the power, on a day-to-day and case-to-case basis, of determining appellate jurisdiction, and, on this same basis, to alter at will the meaning of Section 1291. Furthermore, this contention places within the hands of the District Court the power "to

ignore the Supreme Court's prior construction of that statute": *Bendix Aviation Corp. v. Glass,* (1952) 195 F. 2d 267, 281. Clearly, amended Rule 54(b) should not be so construed.

The rules themselves show that this Court had no intention of extending the jurisdiction of the Courts. Rule 82 pointedly states that "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." While this rule does not refer specifically to Courts of Appeals and technically it would not have been proper to have included reference to appellate jurisdiction therein, it seems clear that the same policy which prompted Rule 82 demands that appellate jurisdiction, as established by Acts of Congress, be not affected. See *Moore's Federal Practice,* Second Edition, Vol. 6, Section 54.21. Judge Learned Hand, in *Flegenheimer v. General Mills, Inc.,* (2 Cir., 1951) 191 F. 2d 237, 241, found the language of Rule 82 "insurmountable" and a "self-denying ordinance" precluding the broad or affirmative construction of the Rule.

See Judge Frank's concurring opinion in *Pabellon v. Grace Line, Inc.,* (2 Cir., 1951) 191 F. 2d 169, 176-177, for a careful analysis of this Court's earlier decisions enunciating principles contrary to and foreclosing the broad or affirmative construction of the rule.

It is certainly clear that Congress never intended any such departure from established principles of appellate jurisdiction such as those necessarily involved in the broad or affirmative construction of amended Rule 54 (b). As this Court pointed out in the *Baltimore*

Contractors case, *supra*, the requirement of finality has remained a part of our law since the Judiciary Act of 1789 and was reenacted in 28 U.S.C., Section 1291, on June 25, 1948. This reenactment of the requirement of finality without change clearly implies legislative adoption of the prior constructions by this Court of Section 22 of the Judiciary Act of 1789 and its subsequent counterparts: *Johnson v. Manhattan Railway Co. et al.*, (1933) 289 U.S. 479, 500. Amended Rule 54 (b) was part of the 1946 amendments to the Federal Rules, which were promulgated on December 27, 1946 but did not become effective until March 19, 1948. Certainly, if Congress had any thoughts of such a sweeping change in appellate jurisdiction as that involved in the subsequent constructions of amended Rule 54 (b), it never would have reenacted Section 1291 and its requirement of "final decisions" for appellate jurisdiction *after* the amendment of the Rules.

F. If Construed to Enlarge Appellate Jurisdiction or to Render Final the District Court's Order Containing the Talismanic Language of the Rule, Amended Rule 54 (b) Exceeds the Rule-Making Power of This Court and Is Invalid.

As we have demonstrated, under the broad or affirmative view of amended Rule 54 (b), as applied by the Court below in this case, appellate jurisdiction has been enlarged and the Courts of Appeals divested of the power and right to determine their own jurisdiction. When so construed, the rule violates not only Section 1291 of Title 28, United States Code, but also the Enabling Act (c. 651, Sec. 1, 48 Stat. 1064, June 19, 1934) authorizing the rules.

Under Article I, Section 8 of the Constitution, Congress was given the power "to constitute" tribunals inferior to the Supreme Court. Under this grant, only Congress can confer jurisdiction upon the inferior Federal Courts and only Congress can regulate the scope and terms of that jurisdiction:

Thomas C. Sheldon, et al. v. William E. Sill, (1850) 8 Howard 441, 449;

Turner v. The President, Directors, and Company, of the Bank of North America, (1799) 4 Dallas 8;

The United States v. Hudson and Goodwin, (1812) 7 Cranch 32;

William F. Carey, et al. v. Edward Curtis, (1845) 3 Howard 236;

Kline et al. v. Burke Construction Company, (1922) 260 U.S. 226.

Of course, this Court and the inferior Federal Courts have the inherent power to adopt rules. That power is of a limited nature and does not extend to enlargement or restriction of jurisdiction. It is at least doubtful whether Congress could delegate to the Courts or to any other tribunals the strictly legislative power of determining the scope and terms of jurisdiction in the inferior Federal Courts: cf. *Wayman, et al. v. Southard et al.,* (1825) 10 Wheaton 1, 42, 43, 45; *The Bank of the United States v. Halstead,* (1825) 10 Wheaton 51. In any event, it is clear that Congress did not grant, by the Enabling Act or otherwise, any power to extend or restrict the jurisdiction conferred by Section 1291. On the contrary, it expressly stated that the rules to be promulgated should "neither abridge, enlarge nor modify" any substantive right.

This Court expressly recognized in *Washington-Southern Navigation Company v. Baltimore & Philadelphia Steamboat Company,* (1924) 263 U.S. 629, that Court rules cannot enlarge or restrict jurisdiction, stating (p. 635):

> "The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict juris-

diction. Nor can a rule abrogate or modify the substantive law."

If, as seems apparent, amended Rule 54 (b) is in conflict with an Act of Congress in regard to jurisdiction, it must give way to the Act.

When construed broadly, Rule 54 (b) also is invalid as violative of the Enabling Act (c. 651, 48 Stat. 1064, 28 U.S.C., Sec. 2072) authorizing the rules. It gave this Court power to prescribe, for the *District Courts,* by general rules, "the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law," and expressly provided that such rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

The broad or affirmative construction of Rule 54 (b) enlarges the jurisdiction of the District Courts by vesting in them power to conclusively grant and determine appellate jurisdiction—a power possessed only by Congress. It also extends or enlarges appellate jurisdiction by granting appellate jurisdiction to the Courts of Appeals in cases in which no "final decision" has been rendered, *e.g.,* the case at bar.

This broad construction also abridges and modifies the "substantive rights" of litigants. The right of appeal in a proper case is a substantive right: *Brown v. McConnell,* (1888) 124 U.S. 489, 490; *Alaska Packers Assn. v. Pillsbury, Deputy Commissioner, et al.,* (1937) 301 U.S. 174, 177. And the denial of an appeal or the granting of one where it did not previously exist abridges, enlarges or modifies substantive rights. Moreover, the Congressional policy discussed by this Court in *Baltimore Contractors, Inc. v. Bodinger,* (1955) 348 U.S. 176,

178, vests in litigants the substantive right of freedom from the expense and delays of repeated appeals in the same suit. That substantive right is clearly abridged or modified by the broad construction of Rule 54 (b). Since it places within the discretion of the trial judge whether to permit an appeal in the exceptional "offshoot" situations, as exemplified by *Forgay et al. v. Conrad,* (1848) 6 Howard 201, and *Radio Station WOW, Inc. et al. v. Johnson,* (1945) 326 U.S. 120, this broad construction abridges or modifies the substantive right of appeal in such cases to protect property rights affected by the judgment. It abridges or modifies the substantive right of intervention in those cases where intervention is a matter of right. And numerous other situations could be mentioned in which the vesting of such broad discretionary powers over appellate jurisdiction in the District Courts would result in abridgment or modification or denial of substantive rights of the litigants.

This Court (doubtless with knowledge of the conflict in the Courts of Appeals), in effect, already has held this broad construction of amended Rule 54(b) untenable. In *Baltimore Contractors, Inc. v. Bodinger,* (1955) 348 U.S. 176, this Court commented upon Congress's long-standing and expressed "policy against piecemeal appeals," pointing out (p. 178) that the "requirement of finality has remained a part of our law" ever since 1789, and then stated (p. 181) that this Court "is not authorized to approve or declare judicial modification" thereof and (p. 181) that it is the responsibility of all Courts "to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system." This Court then stated (pp. 181-182):

"The choices fall in the legislative domain. They are

enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or a *general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent or approval of the appellate court.*"

Thus, this Court has expressly held that the effect given to amended Rule 54 (b) by the proponents of the broad or affirmative construction is outside the rule-making power of this Court and resides solely in the "legislative domain."

We submit that the rule, when broadly or "affirmatively" construed, not only violates Section 1291, U.S.C. and the Enabling Act, but also is inimical to principles repeatedly enunciated by this Court.

G. If Construed to Fix and Enlarge Appellate Jurisdiction, Rule 54 (b) Would Create Numerous Problems in Judicial Administration.

This novel conception of judicial power which gives the District Courts the power to decide matters governing or fixing the jurisdiction of the appellate Courts, including this Court, will most certainly result in non-uniformity, if not chaos, in respect of appellate jurisdiction. Whether or not an appeal will lie in any given set of circumstances will vary from District Court to District Court, as well as from judge to judge, in a given Court. And it may vary from day to day in a single courtroom. Certainly, Congress, in its delineation of appellate jurisdiction, contemplated no such condition, for it has carefully limited appellate jurisdiction to "final

decisions" and a few exceptions thereto specified in Section 1292, U.S.C. Nor did this Court contemplate any such situation in promulgating the rules, as is clear from its pronouncements and the self-imposed limitation of Rule 82.

A District Court, in the exercise of its discretion, may seek enlightenment on one defense or one point of law involved in a multiple claims case, particularly if it will dispose of the case, and will enter an order containing the magic sentence of Rule 54(b), thus granting an appeal in a case prior to rendering a final decision. This sort of thing may create a flood of appeals; but, in any event, it would clearly violate the intent of Congress in limiting appeals in most cases to final decisions.

Various difficulties in the administration of appellate jurisdiction and procedure are pointed out in the Brief for the Petitioner in *Sears, Roebuck and Co. v. Bruce A. Mackey et al.*, No. 34, now before this Court, and will not be reiterated here. It will suffice to state that those problems, inconveniences and possible denial of substantive rights far outweigh the advantage of the mechanical determination of appellate jurisdiction provided under the broad interpretation of the rule.

CONCLUSION.

We submit that the Court below erred in accepting jurisdiction and its decision should be reversed and respondent's appeal dismissed and the case remanded to the District Court for trial on respondent's counterclaim.

Respectfully submitted,

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January 12, 1956.